Petition

Supreme Court, U.S.
FILED
MAR 30 1982
ALEXANDER L. STEVAS
CLERK

81-1819

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VICTOR S. NAVASKY,

Petitioner,

—v.—

CENTRAL INTELLIGENCE AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEON FRIEDMAN
Hofstra Law School
Hempstead, New York 11550
(212) 475-3232

Attorney for Petitioner

Petitioners respectfully pray for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit in this case.

QUESTIONS PRESENTED

1. Is the mere assertion by the C.I.A. that there will be adverse affects on foreign relations if it reveals some of the book publishing titles it financed in the 1960's in the United States because those books were then sent abroad sufficient to meet its burden that such information is properly classified under the appropriate Executive Order and thus exempt from disclosure under Section 552(b)(1) of the Freedom of Information Act.

2. Can the C.I.A. protect from disclosure under the Freedom of Information Act the titles of certain American books it secretly financed in the 1960's merely because it claims that foreign countries will react badly if it is revealed that those books were sent into their countries to influence their population in the face of the fact that some titles have already been revealed, the mechanisms by which the program was operated are now

known and the program was roundly condemned by Congress.

3. Can the C.I.A. refuse to disclose all material relating to a program merely because some segregable portion of the material might arguably fall within exemption (b)(1) in the face of the requirements of the segregability provisions of 5 U.S.C § 552(b).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF CONTENTS	ii
DECISIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	10
The Courts Below Did Not Give Any Meaningful Review to the Classification Decision of the Agency, Contrary to the Direction of Congress in the Amended Act	10
The Grant of Summary Judgment Was Inappropriate since the CIA had Not Shown That the Disclosure of Each and Every Title Requested Would Have The Adverse Affects Predicted	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases — Page

Allen v. C.I.A.
636 F.2d 1287 (D.C. Cir. 1980).....13

Environmental Protection Agency v.
Mink, 410 U.S. 73 (1973)..... 2, 10

Florence v. U.S. Dept. of Defense,
415 F. Supp. 156 (D.D.C. 1976)..... 14

Founding Church of Scientology v.
N.S.A., 610,F. 2d 824 (D.C. Cir.1979)13

Holy Spirit Ass'n v. C.I.A.
636 F. 2d 838 (D.C. Cir. 1980).....13

Jaffee v. C.I.A., 516 F.Supp. 576
(D.D.C. 1981)..... 14

Sims v. C.I.A. 642 F.2d 562
(D.C. Cir. 1980)..... 13

Statutes

5 U.S.C. § 552(b)..... 14
§552 (b)(1)..... 2, 6,8
§ 552(b)(3).....6

50 U.S.C. §403(d)(3).....7

DECISIONS BELOW

The decision of the Court of Appeals for the Second Circuit is unreported but is reprinted in the Appendix at A-1. The first decision of the District Court is reported at 499 F. Supp. 269 (S.D.N.Y.). The second decision of the District Court dismissing the action appears at A-3.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was filed on November 30, 1981. On February 22, 1982, Justice Marshall signed an order extending the time within which to file a petition for certiorari to March 30, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 552(b): "This section does not apply to matters that are -

(1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact property classified pursuant to such Executive Order.

STATEMENT OF THE CASE

1. This case involves a key provision of the amended Freedom of Information Act -- the (b)(1) exemption relating to matters of national security, a provision that this Court has not examined since Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). The courts below ignored Congressional directions that the courts must make meaningful review of the Executive's use of the "secret" stamp. They simply accepted the C.I.A.'s bland assertion that the information would adversely affect our foreign relations -- an absurd conclusion considering the staleness of the information, the disclosure of much of it and the broad conclusionary language used by the Agency.

2. The Freedom of Information request made by the plaintiff involved the secret book pub-

lishing program of the C.I.A. which was described in detail by the Church Committee Final Report investigating questionable C.I.A. activities. (See Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, U.S. Senate, 94th Cong. 2d Sess., Rpt. No. 94-755, Book 1, Foreign and Military Intelligence, (Hereafter "Church Committee Final Report") p. 193 et seq. The C.I.A. entered into the book publishing business in 1961, chiefly to counter the extensive cultural activities of the Soviet Union aimed at third world countries.

3. According to the Church Committee report, an extensive program was then launched which led to well over a thousand books being produced subsidized or sponsored by the C.I.A. (Id. at 193). Approximately 25% were written in English. "More often than not the author was unaware of C.I.A. subsidization." From 1961 to 1967 the program expanded rapidly in the United States and abroad. "In 1967 alone the C.I.A. published or subsidized well over 200 books, ranging from books on wildlife and safaris to translations of Machiavelli's The Prince into Swahili and works of T.S. Eliot into

Russian, to a parody of the famous little red books of quotations from Mao entitled "Quotations from Chairman Liu." (Id. at 194).

4. Even though the original intent of the program may have been that the books subsidized by the C.I.A. would be distributed abroad and not in the American market, apparently most, if not all, of the books written in English, circulated principally in the United States. In addition, many of the books written in other languages were eventually translated into English and circulated in the United States with no indication that the C.I.A. had any role in financing their publication.

5. As far as English language books are concerned, American publishers would publish such books, have them reviewed in the United States, and distribute them through their normal trade channels. This would be true even if a certain portion of the books was destined for a foreign market. This "fallout" into the American market was foreseen, acknowledged and even encouraged by the C.I.A. (Ibid at 198-99).

6. The program of publishing books in the United States directly ended in 1967. As a re-

sult of revelations about C.I.A. use of the National Student Association for its purposes, the agency decided to cut off its direct relations with American publishers as well as American newspapers and magazines. The Deputy Director for Plans ordered that "We will, under no circumstances, publish books, magazines or newspapers in the United States." (Church Committee Final Report at 194). Thereafter the C.I.A. confined its book publishing to foreign books although some continued to be published in English and did in fact circulate in the United States, (Id. at 194).

7. As soon as these revelations were made public, C.I.A. officials acted quickly to assure the Congress that the C.I.A. would not try to influence the American public through covert financing of books. Former Director William Colby testified before the House Select Committee on Intelligence"

> We have taken particular cuation to ensure that our operations are focused abroad and not at the United States in order to influence the opinion of the American people about things from a CIA point of view. Church Committee Final Report at 192.

In a letter to the Church Committee, Mr. Colby wrote:

> CIA will undertake no activity in which there is a risk of influencing domestic public opinion, either directly or indirectly. (Ibid. at 196).

8. On November 16, 1976, plaintiff Navasky, a distinguished journalist and now editor of the Nation magazine, made an FOIA request for the titles, authors and publishers of the "well over a thousand books" which were "produced, subsidized or sponsored by the C.I.A." (18a). He also requested C.I.A. materials made available to the Church Committee relating to the book publishing program and all other C.I.A. materials relating to book publishing whether or not shown to the Church Committee. On February 7, 1977 that request was denied in its entirety by the C.I.A. This suit followed shortly.

9. In 1979, the C.I.A. moved for summary judgment to dismiss the complaint. It claimed the material was exempt from disclosure under exemption (b)(1) (classified documents), (b)(3) (specifically exempt from disclosure by statute) and (b)(5) (intra agency documents). In support of its

motion defendant submitted a 21-page affidavit by John H. Stein, Associate Deputy Director of the Directorate of Operations.

10. Stein claimed that the disclosure of a single book title would be inappropriate for three reasons (1) it would jeopardize the physical safety of the author or publisher; (2) it would disclose an intelligence source or method; and (3) it would affect United States relationships with foreign countries. Our foreign relations would be affected since countries who may tolerate CIA actions within their borders might have to react "in ways that would be prejudicial to the goals of United States foreign policy," if these activities were officially revealed. It would "strain relations between our government" and those where CIA book activities were acknowledged.

11. On September 10, 1980 Judge Metzner granted defendant's motion in part and denied it in part. (499 F. Supp. 269) He rejected the C.I.A.'s claim that the information sought was exempt from disclosure under exemption (b)(3) -- "specifically exempted from disclosure by statute...." i.e., 50 U.S.C. § 403(d)(3) which states

that the Director of Central Intelligence shall be responsible for protecting "intelligence sources and methods from unauthorized disclosure."

12. He also rejected the argument that revealing even a single title would show the "blueprint" by which the book-publishing operation was accomplished since there had already been wide public discussion of the program. However, he concluded that if the C.I.A. could show that revelation of any of the titles would affect our foreign relations, it could succeed in blocking disclosure under (b)(1). But its showing had not been sufficient up to that point. The court allowed the C.I.A. to make additional submissions to show that its claim under (b)(1) and (b)(3) had merit.

13. Based on this invitation, the C.I.A. submitted a third affidavit by Mr. Stein. In that affidavit Mr. Stein repeated many of the same arguments in his previous submissions. He again argued that the book publishing program was "in furtherance of foreign policy and national security objectives." He wrote:

> mere disclosure that the CIA has engaged in any covert book publishing activity involving a foreign country -

> even without identification of the specific books involved - would also be likely to have an adverse foreign relations effect. All countries are necessarily sensitive with respect to the activities of foreign intelligence services in general, and many nations which have been the subject of CIA book publishing activities have shown themselves to be exceptionally sensitive to any revelations of CIA activity directed at them or taking place within their borders.

14. Based on the final Stein affidavit, Judge Metzner accepted the claims of the C.I.A. He adhered to his original decision that no "intelligence source or method" was involved. But he concluded that foreign relations would be affected:

> Disclosure of the information requested would result in revelation of specific book publishing activities aimed at foreign targets. Such revelation would have an adverse effect on foreign relations with the foreign countries and leaders who were targets of the publishing activities. Targeted nations would certainly be upset on learning of CIA activities within their borders or directed at them.

An appeal followed to the Second Circuit Court of

Appeals. They affirmed without opinion, relying on Judge Metzner's opinion.

REASONS FOR GRANTING THE PETITION

The Courts Below Did Not Give Any Meaningful Review to the Classification Decision of the Agency, Contrary to the Direction of Congress in the Amended Act.

This Court in EPA v. Mink, supra, gave a strict reading to exemption (b)(1) as it then stood, holding that once an Executive agency classified a document as secret pursuant to the Executive Order on classification then in force, a court must accept that classification. A federal court could not look behind the classification stamp. 410 U.S. at 84.

Congress immediately took issue with that decision. In 1974, a year later, Congress amended the Act to require that the documents be "properly classified." The Senate Report on the amended Act reported:

> Such abuse of security rationales to forestall or prevent disclosure was not the intent of the authors

> of the FOIA in 1966, and S.2543 makes it clear that such is not the intent now. The addition of the words 'and are in fact covered by such order or statute: to the present language of section 552(b)(1) will necessitate a court to inquire during de novo review not only into superficial evidence -- a 'Secret' stamp on a document or set of records -- but also into the inherent justification for the use of the stamp. Thus a government affidavit certifying the classification of material pursuant to executive order will no longer ring the curtain down on an applicant's effort to bring such material to public light. Senate Report, No. 93-854, 93d Cong. 2d Sess. on S.2543 represented in Sourcebook, Freedom of Information Act and Amendments of 1974, at 182.

The courts below ignored this Congressional command. The Third Stein Affidavit asserted that foreign countries would react badly to disclosure of the fact that some books subsidized by the C.I.A. were sent into their countries in the 1960's. Merely to state that proposition is to show its absurdity. In the past 20 years we have learned about CIA assassination attempts, coup d'etats, bribery of foreign leaders, and political manipulation abroad. These disclosures have been made by Congressional committees and investigative journalists and memoirs of high CIA officials.

It borders on the ridiculous to say that in the face of these disclosures, it will adversely affect our foreign relations to reveal that a book was sent into a particular country 20 years ago. The CIA affidavits very cleverly obscure the exact way in which the books were sent, merely asserting that the foreign nations were the "targets" of the program. The books could have been sent to a U.S.I.A. library in that country, to a University or a cultural center.

It is inconceivable that the country "targeted" would take offense because books from any source were sent to American libraries in that country. But the CIA affidavits are consistent with that hypothetical.

The courts below did not decide the case on the basis that the blueprint for the book publishing program would be revealed. The courts held that the funding mechanisms and general outline of the program as well as certain titles were already known. Most of the authors and publishers did not know the CIA had an interest in their books and could not be considered intelligent sources or methods. To the extent that the CIA could show

that particular persons who were foreign operatives and were promised confidentiality, that might well justify nondisclosure under certain circumstances. But the courts below decided the issue only on the basis that foreign governments would react adversely to disclosure of the titles. The CIA has no special expertise on such matters. Its conclusory affidavit with no other support does not meet the statutory command. Any other conclusion would lead to complete deference to agency classification -- to "ringing the curtain down on an applicant's effort" to discover the material on the agency's say-so -- an approach with Congress explicitly rejected.

Lower court decisions have roundly condemned the type of conclusionary affidavits submitted here. See Founding Church of Scientology v. N.S.A., 610 F.2d 824 (D.C. Cir. 1979); Holy Spirit Association v. C.I.A., 636 F.2d 838 (D.C. Cir. 1980); Sims v. C.I.A. 642 F.2d 562 (D.C. Cir. 1980); Allen v. C.I.A., 636 F.2d 1287 (D.C. Cir. 1980).

The Grant of Summary Judgment was Inappropriate Since the CIA Had Not Shown That The Disclosure of Each and Every Title Requested Would Have The Adverse Affects Predicted

It is a basic cornerstone of the Freedom of Information Act that segregable portions of records requested that are not exempt must be made available. Section 552(b) provides after listing the various exemptions: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." In other words each government agency must show that each and every segregable portion of the record requested under the FOIA is exempt. It is not enough to show that some portions are exempt or that some information relating to the subject matter is covered by a statutory exemption. In (b)(1) cases, an agency cannot classify an entire document as "secret" or "confidential" because some portion of the record is exempt. See Jaffe v. Central Intelligence Agency, 516 F. Supp. 576, 580-581 (D.D.C. 1981); Florence v. U.S. Dept. of

Defense, 415 F. Supp. 156, 157 (D.D.C. 1976). There is no question that in this case, a list of books response to plaintiff's request does exist in C.I.A. files. If disclosure of some of the titles requested could have the adverse affects suggested in the Stein affidavits the C.I.A. might be entitled to withhold them. But Section 552(b) requires that the C.I.A. must prove its entitlement to the exemption claimed as to each and every segregable portion of the record, i.e., every single book title. Put another way, it is the obligation of the agency to show as to every single book title that it could endanger the national security in the manner indicated. That it has clearly not done in the instant case.

Because the courts below did not properly apply the segregability requirement of Section 552(b), certiorari should be granted.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

Leon Friedman
113 University Place
New York, New York 10003
(212) 475-3232
Attorney for Petitioner

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the thirtieth day of November, 1981

Present:

Honorable IVING R. KAUFMAN
Honorable WILLIAM H. TIMBERS
Honorable THOMAS J. MESKILL

VICTOR S. NAVASKY,

Plaintiff-Appellant

v.

CENTRAL INTELLIGENCE AGENCY

Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York,

THIS PAGE INTENTIONALLY LEFT BLANK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it thereby is affirmed for the reasons stated in Judge Metzner's memorandum accompanying his order dated July 1, 1981, and in his opinion of September 10, 1981, Navasky v. Central Intelligence Agency, 499 F. Supp. 269 (S.D.N.Y. 1980).

s/ Irving R. Kaufman
IRVING R. KAUFMAN

s/ William H. Timbers
WILLIAM H. TIMBERS

s/ Thomas J. Meskill
THOMAS J. MESKILL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

VICTOR S. NAVASKY, :

Plaintiff, :

-against- : 77 Civ. 982 (CMM)

CENTRAL INTELLIGENCE AGENCY, :

Defendant. :

- - - - - - - - - - - - - - - - - - - X

METZNER, D. J.:

The defendant, Central Intelligence Agency, renews its motion for summary judgment pursuant to this court's opinion (499 F. Supp. 269), denying summary judgment to the defendant as to certain deletion categories.

The deletion categories which the court found did not support justification were E, F and I in the Vaughn index (484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

The court adheres to its original determination, attempted to be reargued by the movant, that neither the exemption 1 claim (5 U.S.C. §552 (b)(1)) predicated on Executive Order 12065 § 1-301(c), nor the exemption 3 claim (5 U.S.C. § 552

(b)(3)) predicated on 50 U.S.C. § 403(d)(3), as they relate to intelligence sources and methods, are applicable to this case.

However, the affidavit submitted by the movant on this motion does justify a finding that the disclosure of the classified information at issue could reasonably be expected to cause identifiable damage to the national security in the field of foreign relations. 5 U.S.C. § 552(b)(1).and Executive Order 12065 §§ 1-301(d), 1-302.

Substantial weight must be given to the Agency's affidavit regarding the documents' classified status. Ray v. Turner, 587 F.2d 1187, 1194 (D.C. Cir. 1978). In camera inspection of affidavits or documents is not called for in this case. See Allen v. Central Intelligence Agency, 636 F.2d 1287 (D.C. Cir. 1980).

Defendant's affidavits submitted both on the original motion and on this motion permit a fairly complete picture of the activity at issue and the basis for non-disclosure. The affidavits show with reasonable specificity why the documents fall within the first exemption.

Hayden v. National Security Agency/Central Security Service, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Goland v. Central Intelligence Agency, 607 F.2d 339 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

All of the CIA's activities involving book publication or distribution were in support of foreign policy objectives and aimed at foreign targets. Substantial publication took place abroad. Any distributions within the United States was incidental to distribution abroad, or was aimed at distribution to a foreign community within the United States in keeping with certain foreign policy objectives.

Disclosure of the information requested would result in revelation of specific book publishing activities aimed at specific foreign targets. Such revelation would have an adverse effect on foreign relations with the foreign countries and leaders who were targets of the publishing activities. Targeted nations would certainly be upset on learning of CIA activities within their borders or directed at them.

Furthermore, the revelation of cost

figures contained in the documents requested would make available to foreign intelligence services the extent and scope of United States activities.

The CIA has demonstrated that the documents were properly classified and the plaintiff does not seem to contest the good faith of the Agency in this regard.

Motion granted.

So ordered.

Dated: July 1, 1981 /s/ CHARLES M. METZNER
U. S. D. J.

Opposition

Office
FILED
JUL 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1819

In the Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR S. NAVASKY, PETITIONER

v.

CENTRAL INTELLIGENCE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
RICHARD OLDERMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly sustained the Central Intelligence Agency's withholding of classified documents under Exemption 1 of the Freedom of Information Act, 5 U.S.C. 552(b)(1), on the basis of affidavits and a document disposition index showing that the documents were classified pursuant to Executive Order of the President because their release could damage the foreign relations of the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alfred A. Knopf, Inc. v. *Colby*, 509 F.2d 1362, cert. denied, 421 U.S. 992	11
Allen v. *CIA*, 636 F.2d 1287	12
Baez v. *United States Department of Justice*, 647 F.2d 1328	11
Bell v. *United States*, 563 F.2d 484	12
Brown v. *FBI*, 658 F.2d 71	14
Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103	10
Church of Scientology v. *Turner*, 662 F.2d 784	14
DiViaio v. *Kelly*, 571 F.2d 538	11–12
Founding Church of Scientology v. *NSA*, 610 F.2d 824	12
Holy Spirit Association v. *CIA*, 636 F.2d 838, vacated, No. 81–1098 (Mar. 8, 1982)	12
Lead Industries Association v. *OSHA*, 610 F.2d 70	14
Military Audit Project v. *Casey*, 656 F.2d 724	11
Raven v. *Panama Canal Co.*, 583 F.2d 169, cert. denied, 440 U.S. 980	11
Sims v. *CIA*, 642 F.2d 562	10, 12
Snepp v. *United States*, 444 U.S. 507	10
Stein v. *Department of Justice*, 662 F.2d 1245	10–11
United States v. *Nixon*, 418 U.S. 683	10
Vaughn v. *Rosen*, 484 F.2d 820, cert. denied, 415 U.S. 977	4, 14
Weissman v. *CIA*, 565 F.2d 692	14

Page

Statutes and regulations:

Central Intelligence Agency Act of 1949, Section 6, 50 U.S.C. 403g 3

Freedom of Information Act, 5 U.S.C. 552 ..... 2, 3, 10

5 U.S.C. 552(b)(1) 3

5 U.S.C. 552(b)(3) 3

5 U.S.C. 552(b)(5) 3

National Security Act of 1947, Section 102(d)(3), 50 U.S.C. 403(d)(3) 3, 6

Exec. Order No. 12065, 43 Fed. Reg. 28950 (1978) 3, 6

Exec. Order No. 12333, 46 Fed. Reg. 59953–59954 (1981) 13

Exec. Order No. 12356, 47 Fed. Reg. 14876 (1982) 13

Miscellaneous:

Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities—Book I, S. Rep. No. 94–755, 94th Cong., 2d Sess. (1976) 2, 14

H.R. Conf. Rep. No. 93–1380, 93d Cong., 2d Sess. (1974) 10

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1819

VICTOR S. NAVASKY, PETITIONER

v.

CENTRAL INTELLIGENCE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of affirmance of the court of appeals (Pet. App. A-1a) is not reported. The first opinion of the district court is reported at 499 F. Supp. 269. The second opinion of the district court (Pet. App. A-2 to A-5) is reported at 521 F. Supp. 128.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1981. On February 22, 1982, Justice Marshall extended the time within which to file a peti-

tion for a writ of certiorari to and including March 30, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976 a Select Committee of the United States Senate (the "Church Committee") published a report concerning the Nation's foreign and military intelligence activities. *Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities—Book I*, S. Rep. No. 94–755, 94th Cong., 2d Sess. 192–195 (1976). The report stated that prior to 1967, the Central Intelligence Agency had sponsored, subsidized and distributed world-wide over 1,000 books. The report indicated that although some of the books found an incidental market at home, the purpose of this activity was to achieve foreign relations aims by influencing opinion abroad. Three-quarters of the books were published in foreign languages. *Id.* at 192–195, 198–199, 453–454.

Petitioner, a journalist, filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, with the CIA shortly after the Church Committee report became public. He sought disclosure of the titles, authors and publishers of CIA-sponsored and subsidized books; all CIA material made available to Church Committee members and staff relating to these books; and all CIA materials relating to such books, whether or not made available to the Church Committee staff and members. 499 F. Supp. at 271–272. The request was denied by the CIA, and petitioner filed this suit in the United States District Court for the Southern District of New York.

2. The CIA asserted in the district court that the withheld portions of the requested documents were exempt from disclosure principally under Exemptions 1 and 3 of the FOIA, 5 U.S.C. 552(b)(1) and (3), which apply, respectively, to matters that are authorized by Executive Order to be kept secret in the interest of national defense and foreign policy and matters that are specifically exempted from disclosure by statute.[1] As explained in the first affidavit of John H. Stein, then Associate Deputy Director of the CIA's Directorate of Operations, the CIA's Exemption 3 claim was founded upon Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3), which protects "intelligence sources and methods" from unauthorized disclosure. See C.A. App. 44a.[2] The Exemption 1 claim was based

[1] The CIA also asserted that certain communications between the CIA and congressional committees were exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), which applies to inter-agency or intra-agency memorandums or letters that would not be available by law to a party in litigation with the agency. The district court rejected this claim of an exemption on the ground that Congress is not an "agency" for purposes of the FOIA (499 F. Supp. at 278), and this issue is not involved here.

[2] "C.A. App." refers to the Joint Appendix in the court of appeals. Some information also was withheld under Exemption 3 in reliance on Section 6 of the Central Intelligence Agency Act of 1949, 50 U.S.C. 403g, which exempts from disclosure information that would reveal the organization, functions, personnel and similar matters pertaining to the CIA. C.A. App. 44a, 46a, 53a, 54a, 65a. The district court recognized that 50 U.S.C. 403g might apply to some of the information (499 F. Supp. at 275 & n.3) and sustained certain deletions made by the CIA on this ground (*id.* at 278; see C.A. App. 65a). The CIA's reliance on 50 U.S.C. 403g for the withholding of certain material is not involved here.

on Exec. Order No. 12065, 43 Fed. Reg. 28950 (1978) which permits classification of information concerning "intelligence activities, sources or methods" (Section 1-301(c)) and the "foreign relations or foreign activities of the United States" (Section 1-301(d)).

The 20-page Stein affidavit explained in detail the basis for withholding information in various categories falling under the exemptions claimed. C.A. App. 43a-62a. This affidavit was accompanied by a 67-page index, describing individually each of 85 documents, and describing by categories between 1200 and 1500 other documents contained in a project file, that were located in response to the first two parts of petitioner's request. See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).[3] Expurgated copies of 61 of the 85 documents were attached to the index. 499 F. Supp. at 272. The basis for the deletion of part or all of each of the 85 documents withheld was identified in the Document Index, both in narrative form relating to the particular document and by reference to categories of deletions into which particular portions of the document fell. C.A. App. 66a-123a. Subsequently, the CIA filed a supplemental affidavit of Mr. Stein, which reiterated that current damage to the national security could be expected to result from dis-

[3]The CIA objected to preparation of a *Vaughn* index for material in the third category requested by petitioner—all CIA materials and files relating to book publication, whether or not made available to the Church Committee—on the ground that the required search of a substantial number of CIA files would be too burdensome. C.A. App. 59a-61a. Petitioner subsequently withdrew his request for an index of material in the third category (499 F. Supp. at 272 n.2).

closure of the documents because such disclosure could reveal intelligence sources, discourage cooperation by potential intelligence sources in the future, reveal certain intelligence methods still in use, and cause serious foreign relations problems with countries that would be shown to have been targets of the book publishing activities. C.A. App. 147a–150a. The CIA moved for summary judgment on the basis of these submissions.

3. The district court granted the CIA's motion for summary judgment in part and denied that motion in part. The court held that the Stein affidavit and accompanying Document Index provided a sufficiently detailed and nonconclusory explanation of each deletion, including the nature of the information contained therein and how disclosure of each would have untoward national security results. 499 F.2d at 277. The court accordingly sustained the CIA's withholding of the material deleted from the documents that fell in certain categories: information that might disclose the identity of a CIA employee or organizational component, a pseudonym or cryptonym, numerical figures that would reveal the fact and extent of specific book publishing activities, classification markings, and confidential information prepared in response to specific questions from the Church Committee. 499 F. Supp. at 278; C.A. App. 65a. Petitioner does not appear to challenge the validity of these withholdings.

The court denied the CIA's motion for summary judgment with respect to the three remaining categories of deletions, which pertained to individual books and the methods used in their publication. This denial was based on the court's rejection of the CIA's conten-

tion that the book publishing activities of the CIA constituted "intelligence methods" and that the authors and publishers of such books were "intelligence sources" within the meaning of 50 U.S.C. 403(d)(3) and Section 1–301(c) of Exec. Order No. 12065. In the court's view, the meaning of the term "intelligence" for purposes of the statute and Exectuive Order is limited to the product resulting from the collection, collation, and analysis of information and therefore does not encompass activities such as book publication. Accordingly, the court reasoned, the publication of books is not an "intelligence method" and authors and publishers are not "intelligence sources." 499 F. Supp. at 274–275. However, in denying the CIA's motion for summary judgment on this ground, the court observed that the portions of the documents falling in the three categories of deletions at issue might nonetheless be subject to withholding under Exemption 1 if it were shown that they concerned "foreign relations or foreign activities of the United States" and were therefore subject to classification under Section 1–301(d) of the Executive Order. 499 F. Supp. at 275; see also *id.* at 276–277; Pet. 8. Because it appeared that the CIA might be able to justify withholding of the deleted materials, the court's partial denial of the CIA's motion for summary judgment was expressly "without prejudice to a renewal on sufficient showing of exemption" (499 F. Supp. at 278).

4. The CIA then renewed its motion for summary judgment, supported by a third affidavit of Mr. Stein, following his review of the deletions in question. C.A. App. 190a–200a. Mr. Stein averred that although there had been some incidental domestic distribution of the

books (*id.* at 193a–194a), "[a]ll of the CIA's clandestine activities involving book publication or distribution were initiated and conducted in support of *foreign* policy objectives and were aimed at *foreign* targets" (*id.* at 193a; emphasis in original). He further stated that the information in the three deletion categories of primary interest to petitioner—the actual titles, authors and publishers of books covertly sponsored by the CIA—"would directly reveal *specific* covert book publishing activities directed by the CIA at *specific* foreign targets" (*id.* at 194a; emphasis in original). Mere descriptions of the books were expected to lead to the same result (*id.* at 195a). And, Mr. Stein concluded, even if disclosure were limited, for example, to information identifying the languages in which the books were published or the areas in which they were distributed (see *id.* at 65a, Deletion Category F), "this would be likely to result at the very least in identification of specific foreign countries targeted for such covert U.S. propaganda" (*id.* at 195a).

The affidavit explained that disclosure of covert book projects would be adversely received by the targeted foreign countries and leaders, necessarily resulting in a deleterious impact on United States foreign relations even where relations between the United States and the country in question had improved (C.A. App. 196a). Mr. Stein stressed that all countries are sensitive to foreign intelligence activities and that "many nations which have been the subject of CIA book publishing activities have shown themselves to be *exceptionally* sensitive to any revelations of CIA activity directed at

them or taking place within their borders" (*ibid.*; emphasis in original). This is so, he stated, irrespective of the content of the particular books involved here. Moreover, Mr. Stein explained that although a country might have previously suspected or even tacitly tolerated covert CIA activity, an official disclosure of such activity by the CIA might require an official, adverse response by the other nation (*ibid.*).[4] For these reasons, Mr. Stein concluded that release of the material reasonably could be expected to cause identifiable damage to the national security and that the material therefore was properly classified. See Exec. Order 12065, Section 1–302.

Following receipt of the third Stein affidavit, the district court granted the CIA's renewed motion for summary judgment with respect to the remaining three categories of information. Pet. App. A–2 to A–5. In the court's view, the three Stein affidavits "permit a fairly complete picture of the activity at issue and the basis for non-disclosure" and "show with reasonable specificity why the documents fall within the first exemption" (*id.* at A–3). The court concluded that release of the portions of the documents in question "would have an adverse effect on foreign relations with the foreign countries and leaders who were targets of the pub-

[4]The district court, in its initial opinion, had recognized the adverse consequences that could result from official CIA acknowledgement of its intelligence activities. 499 F. Supp. at 276–277.

lishing activities" because "[t]argeted nations would certainly be upset on learning of CIA activities within their borders or directed at them" (*id.* at A–4).[5]

The court of appeals affirmed for the reasons stated in the district court's order and opinion. Pet. App. A–1a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court therefore is not warranted.

Petitioner contends (Pet. 10–13) that the district court erred in granting summary judgment on the basis of the CIA's showing, in the Stein affidavits, that disclosure would adversely affect the foreign relations of the United States. Petitioner disagrees with the CIA's conclusion that the Nation's foreign relations would be damaged by disclosure of book publishing activities involving a particular country, apparently because in his view disclosure of other unrelated activities attributed to the CIA would already have alerted foreign countries to the nature of the CIA's activities. Pet. 12–13. Petitioner even goes so far as to make the extraordinary assertion that the CIA "has no special ex-

[5]The district court also adhered to its original determination that the information in question was exempt from disclosure because it would reveal intelligence sources and methods. Pet. App. A–2 to A–3. The CIA renewed this argument in the court of appeals (81–6155 CIA Br. 43–52), but that court did not reach the issue because it affirmed for the reasons given by the district court (Pet. App. A–1a).

pertise" regarding the manner in which a foreign government might react to disclosure of the information in question, and argues that the courts below should not have given weight to what he characterizes as the CIA's "conclusory affidavit" submitted to the district court. Pet. 13. This argument, which is largely fact-bound, is wholly without merit.

1. When Congress amended the FOIA in 1974, it recognized that "the Executive departments responsible for national defense and foreign policy matters have unique insight into what adverse effect might occur as a result of public disclosure of a particular classified record." H.R. Conf. Rep. No. 93–1380, 93d Cong., 2d Sess. 12 (1974). It was for this reason that Congress made clear that in considering an Exemption 1 claim, a court must give "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." *Ibid.*; see also *Sims* v. *CIA*, 642 F.2d 562, 572 (D.C. Cir. 1980); cf. *Snepp* v. *United States*, 444 U.S. 507, 512 (1980). This rule is consistent with the constitutional principle that courts must accord the "utmost deference" to the Executive regarding military and diplomatic secrets. *United States* v. *Nixon*, 418 U.S. 683, 710 (1974); see also *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). Petitioner therefore plainly errs in contending that the courts below should not have given weight to the CIA's judgment regarding the damage that could result to the Nation's foreign relations from disclosure of intelligence activities directed at specific countries. This is especially so where, as here, such disclosure would constitute official confirma-

tion of such activities, thereby perhaps triggering an adverse response by a foreign government that would feel compelled to act. See *Stein* v. *Department of Justice*, 662 F.2d 1245, 1259 (7th Cir. 1981); *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975).[6]

2. Petitioner characterizes (Pet. 13) the Stein affidavits as "conclusory" and, from this, argues that the decision below conflicts with decisions of the United States Court of Appeals for the District of Columbia Circuit that have disapproved of conclusory affidavits. This argument, too, is insubstantial.

The established rule, in the D.C. Circuit as elsewhere, is that if the affidavits describe the documents and justifications for withholding with reasonably specific detail and demonstrate that the information logically falls within the claimed exemption, and if the affidavits are not controverted by contrary evidence in the record or evidence of agency bad faith, then summary judgment for the government should be granted. See, *e.g.*, *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *Baez* v. *United States Department of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980);

---

[6]Petitioner's argument that the Nation's foreign relations would not be damaged is based on a generalized assertion regarding past activities attributed to the CIA by congressional committees, investigative journalists, and memoirs of former CIA officials. See Pet. 11–12. But such disclosures of particular activities relating to certain countries, even to the extent they are accurate and officially confirmed, obviously do not undermine the CIA's judgment that there would be further damage to the Nation's foreign relations from the disclosure and official confirmation of other intelligence activities directed at specific foreign countries.

Stein v. *Department of Justice, supra*, 662 F.2d at 1253; *Raven* v. *Panama Canal Co.*, 583 F.2d 169, 172 (5th Cir. 1978), cert. denied, 440 U.S. 980 (1979); *DiViaio* v. *Kelley*, 571 F.2d 538, 542–543 (10th Cir. 1978); *Bell* v. *United States*, 563 F.2d 484, 487 (1st Cir. 1977). The district court applied this rule—and indeed relied on D.C. Circuit precedent—in finding the affidavits and accompanying Document Index in this case to be adequate (499 F. Supp. at 276, 277–278; Pet. App. A–3 to A–4), and the court of appeals affirmed on the basis of the district court's opinion and order (Pet. App. A–1a). Therefore, contrary to petitioner's apparent contention (Pet. 13), the legal standard applied by the courts below is fully consistent with that employed by the other courts of appeals.[7] Whether or not the courts below properly applied that test in the circumstances of this case is not a question warranting review by this Court.

In any event, the district court did properly apply these established principles here. The three Stein affi-

---

[7]The pertinent portion of one of the D.C. Circuit cases relied upon by petitioner (Pet. 13), *Holy Spirit Association* v. *CIA*, 636 F.2d 838 (1980), was vacated by this Court as moot after the respondent withdrew its request for the documents while the CIA's certiorari petition was pending. No. 81–1098 (Mar. 8, 1982). A second of the cases cited by petitioner, *Sims* v. *CIA*, *supra*, concerned the definition of the term "intelligence sources," not the sufficiency of affidavits. A third D.C. Circuit case relied upon by petitioner as conflicting with the decision below, *Founding Church of Scientology* v. *NSA*, 610 F.2d 824 (1979), was in fact extensively relied upon by the district court in this case. See 499 F. Supp. at 272, 273, 274, 275, 276, 277, 278. The last D.C. Circuit precedent cited by petitioner, *Allen* v. *CIA*, 636 F.2d 1287 (1980), likewise was relied upon by the district court. Pet. App. A–3.

davits extensively described the types of information involved and the damage to the national security that could be expected to result from its release. The 67-page Document Index accompanying the affidavits in turn described each of 85 individual documents and explained the basis for the withholding, both in terms specifically relating to the particular document and by reference to deletion categories. The Index also described the categories of documents in the project file. This surely was a sufficiently detailed description of the documents and the justification for their withholding, demonstrating that the information logically fell within the exemptions claimed. Petitioner has pointed to no evidence in the record to controvert the CIA's judgment that disclosure of the documents at issue here reasonably could be expected to damage the Nation's foreign relations; he relies only on his unsubstantiated assertion.[8] Finally, as the district court observed (Pet.

---

[8] We note as well that Section 1.3(a)(4) of the new classification Exec. Order No. 12356, which will go into effect on August 1, 1982, expressly provides that the term "intelligence activities"—information about which may be considered for classification—includes "special activities." 47 Fed. Reg. 14876. The latter term is defined for intelligence purposes to mean "activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly," where not intended to influence domestic affairs. See Exec. Order No. 12333, Section 3.4(h), 46 Fed. Reg. 59953–59954. The book publishing activities of the CIA are clearly encompassed by the phrase "special activities." Thus, under Exec. Order No. 12356, information such as that involved in this case will be subject to classification because it involves "special activities," as well as on the ground, accepted by the courts below, that it concerns the foreign relations of the United States. For this additional reason, review of the instant case is not warranted.

App. A–5), petitioner does not appear to question the CIA's good faith. Further review of the application of the settled rule to this case is unwarranted.[9]

---

[9]Petitioner attempts to recast his challenge to the sufficiency of the Stein affidavits and the Document Index by asserting (Pet. 14–15) that the CIA should have been required to justify the withholding of information about each of the numerous individual books involved, assessing separately for each the damage to the Nation's foreign relations that could be expected to result from disclosure. This argument is without merit. The Church Committee stated that well in excess of 1000 books were involved. S. Rep. No. 94–755, *supra*, at 193. The CIA was not able to verify this figure (C.A. App. 58a) and did not divulge the actual number of books it had identified. But even if the actual number was substantially less than that indicated by the Church Committee report, the CIA could not reasonably be expected to develop such an extensive index of numerous individual books. This is especially so since the Agency had already developed, in response to petitioner's request, a thorough, 67-page document disposition index of the 85 documents and project file that the CIA had identified in the first two categories of petitioner's request.

Nor has petitioner offered any reason to believe that the basis for withholding the information pertaining to individual books—*i.e.*, the reasonable likelihood of damage to the Nation's foreign relations because of the reaction of the targeted foreign nation or leader—would apply to some books or countries but not to others (although conceivably the *extent* of the damage might vary in particular cases). Accordingly, there is no indication that any useful purpose would have been served by a repetition of the basis for withholding information in a separate statement about each book.

Moreover, it is unnecessary for a court "to undertake a line-by-line analysis of the agency records" (*Weissman* v. *CIA*, 565 F.2d 692, 698 (D.C. Cir. 1977)) on the possibility that "some bits of non-exempt material may be found among exempt material" (*id.* at 697). See also *Brown* v. *FBI*, 658 F.2d 71, 74 (2d Cir. 1981); *Lead Industries Association* v. *OSHA*, 610 F.2d 70, 87–88 (2d Cir. 1979). Nor must an agency's justification be so detailed as to jeopardize the confidentiality of the information. *Church of Scientology* v. *Turner*, 662 F.2d 784, 786–787 (D.C. Cir. 1980). Here, the book-by-book justification petitioner seeks would have required an identification of the countries involved, the very harm the CIA has sought to prevent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
RICHARD OLDERMAN
Attorney

JULY 1982